

October 2, 2002

David M. Kaiser  
Federal Consistency Coordinator, Coastal Programs Division  
Office of Ocean and Coastal Resource Management  
NOAA  
1305 East-West Highway, 11th Floor  
Silver Spring, MD 20910

Re **Federal Consistency Energy Review Comments**  
[Docket No. 020422093-2093, July 2, 2002]

Dear Mr. Kaiser,

The following comments are submitted on behalf of the Environmental Defense Center (EDC), a non-profit public interest law firm that represents community organizations dedicated to the protection of the environment along California's South Central Coast. The EDC handles many cases involving application of the Coastal Zone Management Act (CZMA) and currently represents eight environmental organizations in the pending case of *State of California v. Norton* (Ninth Circuit Court of Appeals). The purpose of the case is to enforce the federal consistency requirements of the CZMA.

The EDC urges NOAA to refrain from undertaking any rulemaking at this time to modify the CZMA regulations that were updated in December, 2000 and went into effect in January, 2001. The 2000 update was the result of a comprehensive, five-year review effort that responded to statutory, judicial and practical changes in the interpretation and application of the CZMA. The questions presented in the Advanced Notice of Rulemaking are adequately addressed in the 2000 update. NOAA has failed to provide any evidence of problems under the 2000 CZMA regulations.

Furthermore, the Advanced Notice of Rulemaking appears to suggest revisions that would undermine or weaken the federal consistency provisions of the CZMA (16 U.S.C. Sec. 1456(c)). The consistency provisions of the CZMA are the cornerstone of the Act and are necessary to ensure the Federal/State comity and coordination promised in 1972 when the Act was first passed. Any effort to dilute State consistency review would impair the States' vital and important role in protecting our precious coasts from pollution, industrial development, and other threatened harm.

In addition to these general concerns, EDC offers the following specific responses to the questions posed in the Advanced Notice of Rulemaking.

1. *Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP [Coastal Management Program] and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements.*

First, NOAA has not documented any problems with the current review process. Second, it would be difficult, if not impossible, for NOAA to unilaterally and universally describe “the scope and nature of information necessary” for consistency review because each State’s review is based upon its individual certified CMP. Therefore, each State may require different information based upon the needs and concerns identified in its CMP. As the 2000 CZMA regulations point out, “Whether a particular federal action affects the coastal zone is a factual determination” to be made on a “case-by-case” basis. 65 FR 77125. Therefore, the States must retain the ability to request the information appropriate and necessary to complete a thorough consistency review.

2. *Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)A(), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.*

Again, the Notice fails to provide any evidence of problems with the processing of CZMA appeals. In any event, the CZMA already includes a timeframe within which the Secretary must act on an appeal once the record is completed. 16 U.S.C. Sec. 1465. The regulations should not be amended to impair the States’ abilities to prepare a complete record, and thereby protect their coastal interests.

3. *Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA.*

The only problems we are aware of have arisen as a result of MMS’ failure to allow State review of offshore oil and gas activities and projects. The proper remedy to this problem is for the MMS to simply coordinate better with coastal States to ensure proper review. The shortcomings are within the agency, not the regulations.

For example, in 1995 MMS approved a high energy seismic survey offshore Santa Barbara County, California, without requiring Exxon to submit a consistency certification to the State. The State, County, and several environmental organizations threatened to bring a legal challenge. At the last minute, Exxon negotiated a mitigation agreement that allowed the survey to proceed. Subsequently, MMS established a stakeholder process to develop recommendations for better coordination in the future (the High Energy Seismic Survey Task Force, or HESS). Through that process, MMS and the oil industry agreed

that California would have the right to review future proposed seismic surveys through the consistency review process.

Another example is the MMS' failure to allow the State of California to review 36 federal lease suspensions, the subject of the pending litigation. In this case, the State specifically requested the right to review the lease suspensions, and the MMS refused. The State sued the federal government, and received a favorable ruling in 2001. (150 F.Supp.2d 1046 (9th Cir. 2001), *appeal pending*.)

Clearly, the federal agencies already have the ability and responsibility to coordinate more effectively with the States to ensure adequate opportunities for consistency review. In the 1990 amendments to the CZMA, Congress was clear in its intent that the federal government provide better coordination and more expansive State review.

4. *Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.*

The 2000 CZMA regulations already provide for flexibility regarding negative determinations. See 15 C.F.R. 930.33(a)(3)(ii), 930.35(a).

5. *Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 C.F.R. 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.*

The 2000 CZMA regulations already provide ample guidance for determining the appropriate geographic applicability of State review. See 15 C.F.R. 930.53. The amended CZMA regulations were promulgated, in part, in response to the 1990 Amendments to the CZMA, which required an expanded scope of State review, regardless of geographic jurisdictional limitations. See 15 C.F.R. 930.11(g).

The geographic range for consistency review must be determined on a case-by-case basis, depending upon the type of activity, location and sensitivity of affected resources, and potential coastal effects. In the 1990 Amendments to the CZMA, Congress clarified that States should have the right to review federal activities located *outside* the State's coastal zone, and that the scope of State review depends upon the location and extent of the coastal zone effects (including indirect effects), not the location of the activity. See CZMA Sec. 307(c)(1); 136 Cong. Rec. H8068, H8076, Sept. 26, 1990.

NOAA should take note of the fact that Gov. Bush of Florida recently pointed out that oil and gas leases located *100 miles offshore* would have an effect on the State's coastal

zone. Clearly, federal offshore activities can have coastal zone effects from a great distance.

6. *Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not "described in detail" in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.*

Again, provisions for consolidation already exist in 15 C.F.R. 930.59, 930.81. This concern can be readily addressed if the relevant federal agencies coordinate with each other and with the appropriate coastal State(s) early in the process. This coordination can, and should, occur under the existing CZMA regulatory framework.

#### *Conclusion*

EDC urges NOAA to work with the appropriate Federal agencies to ensure compliance with the clear intent and requirements of the 1990 CZMA Amendments and 2000 CZMA regulations. In doing so, the Federal government will facilitate coordinated and comprehensive review of federal activities and federally-authorized projects that may effect a State's coastal zone.

Thank you for your consideration of these comments.

Sincerely,

Linda Krop  
Executive Director/Chief Counsel

cc: U.S. Senator Barbara Boxer  
U.S. Senator Dianne Feinstein  
U.S. Representative Lois Capps  
California Coastal Commission  
State Senator Jack O'Connell  
State Assemblymember Hannah-Beth Jackson  
County of Santa Barbara  
County of San Luis Obispo